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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:) Case No. 09-29162-D-11

SK FOODS, L.P.,)

Debtor.)

BRADLEY D. SHARP, Chapter 11
Trustee,)

Adv. Pro. No. 09-2543-D

Plaintiff,)

Docket Control No. BW-1

v.)

CSSS, LP, a California limited
partnership,)

DATE: April 27, 2011

TIME: 10:00 a.m.

Defendant.)

DEPT: D

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.

MEMORANDUM DECISION

On January 20, 2010, Bradley D. Sharp, the plaintiff in this adversary proceeding and trustee in the underlying chapter 11¹ case of SK Foods, L.P. (the "trustee"), filed a motion for an order to show cause why the defendant CSSS, LP, dba Central Valley Shippers ("CVS"), Monterey Peninsula Farms LLC, Scott Salyer, Gerard Rose, and Larry Lichtenegger ("Lichtenegger")

1. Unless otherwise indicated, all Code, chapter, and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All Rule references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 should not be held in contempt for violation of a temporary
2 restraining order and preliminary injunction issued earlier by
3 this court (the "contempt motion"). On March 21, 2011,
4 Lichtenegger filed a motion for summary judgment on the contempt
5 motion, Docket Control No. BW-1 (the "Motion"). The Bank of
6 Montreal ("BMO"), which has acquired the trustee's claims in this
7 adversary proceeding by assignment, opposes the Motion. For the
8 reasons set forth below, the court will deny the Motion.²

9
10 **I. BACKGROUND**

11 This adversary proceeding concerns certain items of
12 equipment and machinery the parties refer to as a drum line and
13 the events leading up to its being transported to New Zealand in
14 August of 2009. On August 24, 2009, this court issued an order
15 restraining and enjoining CVS, its officers, agents, servants,
16 employees, and attorneys, and those in active concert or
17 participation with them from moving the drum line to any location
18 outside of California (the "TRO"). It is undisputed that on
19 August 24, 2009, the day of the hearing, the drum line was in the
20 Port of Oakland awaiting documentation that would allow it to be
21 exported, and that it did not leave the Port of Oakland for New
Zealand until a week later, August 31.

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26 2. In a tentative ruling issued prior to the hearing, the
27 court expressed its view that the Motion was covered by the stay
28 of proceedings issued by the district court. Lichtenegger's
counsel argued at the hearing, as in the papers, that the Motion
is not covered by the stay. Upon further consideration, the
court finds that it can resolve the Motion without testimony of
Scott Salyer or his criminal defense attorney.

1 II. ANALYSIS

2 A. Lichtenegger's Version of Events

3 Lichtenegger contends he "knew nothing about the Drum Line
4 before [the trustee] applied for the TRO"³ and that he "had no
5 involvement with any of [the] activities" by which the drum line
6 was moved from the premises of CVS (in Selma, California),
7 consigned to a carrier, and ultimately shipped to New Zealand.
8 Memo, 1:14-2:2. The events of Friday, August 21, through Monday,
9 August 24, 2009 are critical to the resolution of the Motion.
10 Lichtenegger alleges this series of communications:

11 • The trustee's counsel called CVS's attorney, Gerard Rose,
12 on Friday and told him he would be filing an application for a
13 TRO and would be appearing on Monday, August 24, at 11:00 a.m. on
14 the application.

15 • Rose was going to be on vacation on August 24 and asked
16 Lichtenegger to make a special appearance on behalf of CVS to
17 oppose the application. Lichtenegger said he would if he could
18 resolve a scheduling conflict.

19 • Lichtenegger had a telephone conversation on Friday,
20 August 21, with Rose and Malcolm Segal, criminal defense attorney
21 for Scott Salyer, the principal of the debtor in this case, SK
22 Foods, L.P., to discuss the TRO hearing, during which Segal
23 informed Lichtenegger the drum line had already shipped -- on
24 August 20.

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28 3. Memorandum in Support of Larry J. Lichtenegger's Motion
for Summary Judgment, filed March 21, 2011 ("Memo"), 1:13-14.

1 • At Rose's request, Lichtenegger called the trustee's
2 counsel and left the voicemail message quoted below.⁴

3 • Lichtenegger spoke later that afternoon with the trustee's
4 counsel, who "was very aggressive and refused to discuss the
5 situation with him," Memo, 6:10-11, and who immediately filed a
6 declaration that included a transcript of Lichtenegger's earlier
7 voicemail message.

8 • Lichtenegger decided by Monday morning, August 24, "not to
9 get involved," cancelled the Court Call appearance he had earlier
10 arranged, left a voicemail message for the trustee's counsel that
11 he would not be appearing, and did not appear at the hearing.

12 • Lichtenegger "had no involvement with the Drum Line or the
13 export process after the TRO issued."

14 In other words, according to Lichtenegger, his involvement
15 with the drum line was limited to his being asked to make a
16 single special appearance and ultimately declining to make that
17 appearance. "When [Lichtenegger] did not appear [at the
18 hearing], his engagement was at an end [BMO] produces no
19 evidence that Lichtenegger was asked (until weeks later) to
20 perform any other service for CVS."⁵

21 Lichtenegger purposefully refused to appear on
22 behalf of CVS the morning of the TRO hearing. He took
23 no further actions on behalf of CVS. [Note.] He chose
24 to remove himself from that association before the
injunction was even issued, and any facts linking him
with CVS after August 21 are so attenuated that it will

25 4. No one has suggested a reason why Rose did not make this
26 call himself if, as discussed below, Lichtenegger's role was to
be limited to making a special appearance at the hearing.

27 5. Reply Memorandum in Support of Larry Lichtenegger's
28 Motion for Summary Judgment, filed April 20, 2011 ("Reply"), 6:8-
10.

1 be impossible for [BMO] to show by clear and convincing
2 evidence that Lichtenegger acted on behalf of CVS in
any capacity.

3 Reply, 6:11-15, emphasis in original.

4 **B. Lichtenegger's Greater Involvement**

5 The court finds that Lichtenegger's involvement with Salyer,
6 CVS, and/or the drum line, both before and after the TRO was
7 issued, was nowhere near as circumscribed as he contends. First,
8 on Friday, August 21, before the TRO hearing the following
9 Monday, he left a message for the trustee's counsel advising that
10 he had been asked to make a special appearance. However, rather
11 than leaving it at that, he added, "I wanted to inform you that
12 I've investigated and confirmed that the drums [sic] shipped on
13 Thursday -- they are already gone. That makes your application
14 for a TRO moot. You may have other issues, but not a TRO."⁶

15 With those words, Lichtenegger went well beyond actions that
16 might be expected from someone whose role is limited to
17 considering whether to make a special appearance. Quite the
18 contrary, they went directly to the substance of the application
19 for the TRO. They were clearly designed to convince the
20 trustee's counsel that his application for a TRO was too late.
21 In fact, had the trustee's counsel relied on those words, as
22 Lichtenegger almost certainly intended him to, he might have
23 foregone the hearing altogether and lost any chance of preventing
24 the shipment of the drum line.⁷ Lichtenegger's present

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26 6. Larry J. Lichtenegger's Documentary Evidence in Support
of Motion for Summary Judgment, filed March 21, 2011 ("LDE"), 70.

27 7. In fact, when the trustee's counsel returned his call
28 later that day, Lichtenegger again said he understood the drum
line had shipped the previous day and "requested that the hearing

1 contention -- that he did not represent any person or entity in
2 connection with the drum line -- appears disingenuous in light of
3 this language.

4 Next, it appears Lichtenegger did not have a firm basis on
5 which to "confirm" to the trustee's counsel that the drum line
6 had already shipped. He has testified he left the voicemail
7 message at 3:16 p.m. on Friday. BMO Exhibits, 000713. At 3:29
8 p.m. that day, he was copied with an e-mail from Segal to Salyer
9 stating, "I just spoke to Larry [Lichtenegger] and Gerard [Rose].
10 If the goods have already shipped, the TRO application is
11 mooted." BMO Exhibits, 000276, emphasis added. At 3:31 p.m.
12 that day, Lichtenegger e-mailed a single line to Salyer:
13 "Confirm drums shipped on Thursday?" Id., 000277. On Sunday,
14 August 23, Salyer e-mailed Lichtenegger, "Equipment does not ship
15 out until Wednesday earliest." Id., 000278. And seven minutes
16 later, "Departs Thursday." Id., 000280.⁸

17 Despite this new knowledge, which directly contradicted what
18 he had "confirmed" to the trustee's counsel, Lichtenegger
19 testified as follows on September 1, 2009, the day after the drum
20 line actually shipped, concerning his decision not to appear at
21 the August 24 hearing:

22 Over the weekend [August 22-23], I debated the
23 usefulness of my appearance in light of my conflict
24 with the deposition [the scheduling conflict referred

25 be continued as there was no longer an emergency." Exhibit
26 Appendix in Support of Plaintiff's Opposition to the Motion of
27 Larry Lichtenegger for Summary Judgment, filed April 13, 2011
28 ("BMO Exhibits"), 000713.

8. Lichtenegger did not submit these e-mails with the
Motion and made no mention of them; they were submitted by BMO in
its opposition. Lichtenegger does not deny receiving them.

1 to above], the non-schedule notification by Courtcall
2 [a call Friday afternoon informing him the TRO hearing
3 was not on calendar], and the fact that the drum line
4 had already shipped and the hearing was a non-event. I
5 decided that my appearance at the hearing, if in fact
one would occur, was useless as there was nothing I
could do to aid the court or any of the parties in this
dispute.

6 BMO Exhibits, 000713-714.

7 The court need not determine at this time Lichtenegger's
8 truthfulness in making that statement on September 1 in light of
9 Salyer's two e-mails to him on August 23. The court also need
10 not decide whether Lichtenegger's failure to correct his earlier
11 misinformation to the trustee's counsel -- misinformation he knew
12 the trustee's counsel had conveyed to the court in a declaration
13 -- gives rise to liability. Indeed, Lichtenegger contends, and
14 the court might later determine, that he was precluded by duties
15 to a client (although he claims he had none) or by the attorney-
16 client privilege from divulging the new information. For present
17 purposes, the court finds that these e-mails raise serious
18 questions about the credibility of Lichtenegger's present
19 contentions that his role was limited to deciding whether to make
20 a special appearance, and that as such, he could not have been
21 covered by the TRO.⁹

22 But Lichtenegger did not stop there. He did not, as he
23 contends, have "only one possible engagement -- to specially
24

25 9. The Salyer e-mails of August 23 also raise questions
26 about the credibility of Lichtenegger's present testimony that
27 "[a]t all times relevant to this motion, my only understanding
28 was that the drum line had been shipped from CVS's control and
the shipment could no longer be stopped." Declaration of Larry
J. Lichtenegger in Support of Motion for Summary Judgment, filed
March 21, 2011, 2:13-14.

1 appear at the hearing." Reply, 9:11-12. A series of e-mails on
2 August 24 and 25, 2009, among Salyer and various attorneys,
3 including Lichtenegger, leads to the conclusion that, far from
4 divorcing himself from the process and the players after the TRO
5 hearing, Lichtenegger remained very much involved.

6 Beginning on Monday, August 24, Salyer and a group of
7 attorneys, including Lichtenegger, exchanged a series of e-mails
8 in which it was suggested that Lichtenegger contact the attorney
9 for Olam, an entity that had by that time purchased the debtor's
10 business operations from the estate, and threaten to sue Olam if
11 it would not return certain property. Lichtenegger responded by
12 asking for the name and phone number of Olam's attorney. He
13 agreed with Putterman that they needed to think carefully about
14 their approach "because of the possible effect on the subcon
15 case" (presumably the trustee's substantive consolidation
16 action), LDE 196, and stated that he "wanted to be sure of entity
17 separation before [he] called [Olam's attorney]." Id.

18 Lichtenegger then expressed confusion about the drum line
19 versus certain "color sorters," stating,

20 I thought the drum line was shipped out already and was
21 the subject of the TRO on Monday. Could be just my
22 confusion. Help. Left a message for Scott [Salyer],
but he has not responded.¹⁰

23 Putterman's response was not to the point, and Lichtenegger
24 replied, "I'll find out." LDE 195.

25 For purposes of this Motion, the court need not determine
26 what person or entity Lichtenegger was representing in these
27

28 10. LDE, 195-196.

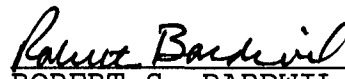
1 exchanges, whether these or other discussions or e-mails
2 concerned the drum line or something else, or whether
3 Lichtenegger played any role in the transfer of the drum line
4 after the TRO was issued. For present purposes, the court
5 concludes from these e-mails that Lichtenegger continued to play
6 some significant role with Salyer and/or his attorneys
7 immediately after the TRO was issued and before the drum line
8 actually left the Port of Oakland, a role he now attempts to
9 repudiate.

10 III. CONCLUSION

11 For the reasons discussed above, the court cannot conclude
12 that there are no genuine issues of material fact with respect to
13 Lichtenegger's role in the events leading up to the drum line
14 being shipped out of California. As a result, the court cannot
15 conclude that Lichtenegger is entitled to judgment on the
16 contempt motion as a matter of law. See Celotex v. Catrett, 477
17 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986).

18 For the reasons set forth above, the Motion will be denied.
19 The court will issue an appropriate order.

20 Dated: May 9, 2011



21 ROBERT S. BARDWIL
22 United States Bankruptcy Judge
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CERTIFICATE OF MAILING

I, Andrea Lovgren, in the performance of my duties as Deputy Clerk to the Honorable Robert S. Bardwil, caused to be mailed by ordinary mail a true copy of the attached document to each of the parties listed below:

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DATE: May 9, 2011


Deputy Clerk